UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al*, Individually and On Behalf of All Others Similarly Situated,	:	Civil Action No. H-01-3624 **(Consolidated)**
Plaintiffs,	:	CLASS ACTION
v.	:	
ENRON CORP., *et al*.	:	

SUR-REPLY OF THE STATE RETIREMENT SYSTEMS GROUP IN SUPPORT OF ITS MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND ITS SELECTION OF LEAD COUNSEL

The State Retirement Systems Group ("State Group") submits this brief sur-reply to respond to various arguments raised for the first time in several of the reply briefs submitted by the other lead plaintiff applicants, and to submit a joint statement from the Attorneys General of Illinois, Kentucky, Nevada, New Mexico, North Carolina, Oklahoma, Oregon and Tennessee supporting the application of the State Group to serve as lead plaintiff in this action. The State Group has endeavored to keep this reply as short as possible.

I. THE STATE GROUP CONSISTS OF A TOTAL OF FIVE FUNDS OVERSEEN BY THREE ATTORNEYS GENERAL WITH TWO PROPOSED LEAD COUNSEL.

The Milberg Weiss Group ("Milberg" or "the Milberg Group") – which now consists only of The Regents of the University of California – makes the argument that the State Group consists of eleven different funds and, thus, eleven different applicants for lead plaintiff. This is incorrect.

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The State Group consists solely of the state-administered retirement systems for Georgia, Ohio and Washington: (1) The Teachers Retirement System of Georgia, (2) the Employees' Retirement System of Georgia, (3) the Teachers Retirement System of Ohio, (4) the Employees' Retirement System of Ohio, and (5) the Washington State Investment Board. Milberg cites to six Alabama funds to support its argument that there are eleven funds in the State Group.[1] However, the State Group has made it clear from the very beginning that Alabama was not an applicant for lead plaintiff.[2] In addition, by statute, the Attorneys General of Georgia, Ohio, and Washington are responsible for litigation involving the funds for their states, so there is in reality a small group of but three Attorneys General who control the litigation for the State Group.

Milberg's argument that the State Group lacks cohesiveness and is unwieldy is also incorrect. Milberg has misstated the number of attorneys the State Group seeks to designate as lead counsel. The State Group seeks the appointment of only two lead counsel – Martin D. Chitwood of the law

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[1] There is no division of authority in the Retirement Systems of Alabama ("RSA") because the governing Boards for the pension funds have vested a chief executive officer, Dr. David G. Bronner, with the authority to make legal and investment decisions for all of the funds.

[2] The State Group is not proposing to include Alabama as a lead plaintiff or as part of the group's decision-making process. The State Group chose to include Alabama as an advisory plaintiff in this matter simply because Alabama asked if it could be included in the litigation in the capacity other than a lead plaintiff. Alabama, with losses exceeding $47 million, is merely interested in providing the State Group assistance in this case as an advisory plaintiff should the State Group deem it necessary. In fact, the role Alabama would play is roughly equivalent to the "committee" role the Florida Group has suggested for other institutional investors. *See* Memorandum of Law of the Florida State Board of Administration and the New York City Pension Funds in Further Support of Their Motion for Appointment as Co-Lead Plaintiffs and in Opposition to Other Lead Plaintiff Applications at 5 n. 6. The State Group agrees that such an advisory committee of institutional investors is desirable, regardless of the outcome of the current lead plaintiff dispute. In the event this Court appoints the State Group to serve as lead plaintiff, institutional investors will be offered the opportunity to serve on such an advisory plaintiffs committee.

firm Chitwood & Harley, and Jay W. Eisenhofer of the law firm Grant & Eisenhofer, P.A. – and one liaison counsel – Tom A. Cunningham of the law firm Cunningham, Darlow, Zook & Chapoton, L.L.P.

In addition, the members of the State Group have entered into a comprehensive litigation management agreement (the "Agreement") that addresses all collective decisions that must be made in the context of litigating this case. This Agreement is the product of extensive discussions, and among other things, it (1) governs the retention of private counsel and limits the payment of fees to such firms, (2) establishes the decision-making protocol for the litigation, (3) adopts an appropriate media policy for counsel, and (4) establishes procedures for monitoring and managing the litigation. Each of these provisions has been designed to ensure the orderly and effective prosecution of this litigation, and to maximize the class's potential recovery in the process. The State Group has previously offered to submit this agreement for in camera review.

II. THE INVOLVEMENT OF THE ATTORNEYS GENERAL DOES NOT RENDER THE STATE GROUP "LAWYER-CONTROLLED."

Other applicants for the position of lead plaintiff also incorrectly argue that the involvement of the attorneys general of Georgia, Ohio, and Washington somehow render the State Group "lawyer-driven." The involvement of the attorneys general of three different states does not make the State Group the kind of improper "lawyer-driven" amalgamation discouraged under the PSLRA, which was enacted to curtail class-action lawsuits controlled by *private* class-action lawyers. The supervision of Attorneys General – who have statutory duties to their state pension funds – is actually the best insurance against lawyer-driven litigation.

There is a fundamental difference between plaintiff groups assembled by the public representatives of the various states, who are statutorily charged with representing the interests of their respective state's pension funds, and plaintiff groups that are assembled by private law firms posturing for a position as lead counsel. As Attorney General Baker noted in his Declaration, "Although Georgia, Ohio, and Washington have moved for appointment as lead plaintiff, there is a high level of interest among the entire NAAG membership in the outcome of this Litigation because of the magnitude of this matter and its effect on each state's pension funds." *See* Declaration of Thurbert E. Baker in Support of the Motion of the State Group for the Appointment of Lead Plaintiff and for Approval of its Selection of Counsel ¶ 6. Indeed, the Attorneys General of Illinois, Nevada, New Mexico, Tennessee, Kentucky, Oklahoma, North Carolina, and Oregon specifically support the efforts of the State Group to serve as lead plaintiff: "Respectfully, we believe that this class action would be most effectively prosecuted if the State Retirement Systems Group were appointed Lead Plaintiff and its counsel appointed Lead Counsel." *Declaration of Support from the Attorneys General of the States of Illinois, Kentucky, Nevada, New Mexico, North Carolina, Oklahoma, Oregon and Tennessee for the Appointment of The Teachers and Employees' Retirement Systems of Georgia, The Teachers and Employees' Retirement Systems of Ohio, and the Washington State Investment Board as Lead Plaintiff* (attached hereto as "Exhibit A"). Moreover, participation in this litigation by the chief legal officers of the various states best ensures the protection of the public interests of all investors. *See* Letter of Support, dated January 31, 2002, from Michael E. Cahill, Esq., Managing Director and General Counsel, The TCW Group, Inc., to the Hon. Melinda Harmon (attached hereto as "Exhibit B").

III. FLORIDA'S ADEQUACY AND TYPICALITY PROBLEMS HAVE BECOME MORE ACUTE

The State Group has noted that Florida cannot appropriately serve as lead plaintiff in this litigation because of a crippling conflict stemming from Florida's close relationship with Alliance Capital Management Holding LP ("Alliance").[3] *See* Memorandum of the State Retirement Systems Group in Opposition to the Florida Group's Motion for Appointment as Lead Plaintiff at 2-12. Within the past few days, Florida's conflict has come into sharper focus. For one thing, the Florida Attorney General's office has subpoenaed documents from Alliance and Enron concerning the relationship between the two. *See* John Shipman, *Alliance Cap CEO: Exec's Enron Ties Unrelated to Investment*, Dow Jones News Serv., Jan. 31, 2002. The subpoena commands production of, inter alia, documents regarding Frank Savage's service on the Enron Board of Directors, documents regarding Savage's role in any purchase decisions, and documents regarding Alliance's communications with 29 different officers and directors of Enron. In addition, the Governor of Florida has joined Florida's Attorney General in publicly advocating that the Florida Board look into a possible lawsuit against Alliance. As noted earlier, pursuit of such individual, non-class claims would create an absolute conflict for Florida if it were required to make decisions in the class

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[3] Apart from the Alliance conflict, Florida is presumptively disqualified from serving as lead plaintiff because it already has served in that capacity too many times. Recently, the State of Wisconsin Investment Board filed an amicus brief asking this Court to allow Florida to exceed the PSLRA's limit. However, even if this Court were to decide that the PSLRA's "five-in-three" limit should not apply to institutions, the fact is that Florida has gone far beyond five PSLRA cases in the past three years. See Memorandum of the State Retirement Systems Group in Opposition to the Florida Group's Motion for Appointment as Lead Plaintiff at 12-14 ("Including the instant litigation, the Florida Board has moved to be a lead plaintiff in thirteen securities fraud class actions in just the last five years."). As a practical matter, Florida is simply too busy to adequately manage a litigation of this size.

litigation that will affect the value of its non-class claims. *See Katz v. Comdisco*, 117 F.R.D. 403, 409 (N.D. Ill. 1987).

IV. MILBERG CANNOT INFLUENCE THE LEAD PLAINTIFF DETERMINATION THROUGH ITS EARLY ACTIVISM.

Milberg Weiss argues that the amount of time the firm allegedly has invested in this litigation to date somehow automatically entitles its named client – the one it chose to retain out of its original five clients – to be designated as lead plaintiff. Milberg's argument in this regard has no basis in law, and threatens to undermine the very purposes of the PSLRA.

Under the PSLRA, the applicant that "has the largest financial interest in the relief sought by the class" is presumptively the most appropriate lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). This presumption may only be rebutted upon proof that the applicant (a) "will not fairly and adequately protect the interests of the class;" or (b) "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The fact that Milberg has attempted to assume control over the litigation before this Court has had an opportunity to rule on the lead plaintiff applications provides no basis for a ruling in its favor. Indeed, Milberg's argument in this regard presents a slippery slope that threatens to undermine the very purpose of the PSLRA. Because the PSLRA was designed to discourage lawyer-controlled plaintiff groups, this purpose would be thwarted if a private law firm could gain a foothold in the leadership structure simply by filing more motions and making itself more visible than any other lead plaintiff applicant.[4]

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[4] As the Third Circuit noted with regard to the PSLRA's most adequate plaintiff presumption, "once the presumption is triggered, the question *is not* whether another movant

In fact, counsel for the State Group have been involved in all aspects of the litigation to date, have retained a former agent of the Federal Bureau of Investigation to conduct forensic discovery from the defendants' computer files, and have actively participated in the negotiation of the proposed discovery order regarding the preservation of evidence in the custody and control of Arthur Andersen LLP. In addition, members of the State Group have been involved in and supportive of the ongoing federal investigations and Congressional hearings. The State Group, however, has entered into an agreement that restricts public statements to the press. Thus, the efforts of the State Group have been out of sight of the media.

V. THE STATE GROUP APPROPRIATELY CALCULATED ITS LOSSES.

Milberg argues that the State Group somehow realized a "$67+ million profit" on the sale of Enron securities. For the sake of brevity, the State Group will simply note that Milberg does not argue that the State Group's damages are calculated incorrectly, but rather that "superficially inconsistent and irrational sales and purchases during the class period . . . will not be ignored by skillful defense counsel." *See* The Regents of the University of California's Reply in Support of Its Motion to be Appointed Lead Plaintiff at 30 (acknowledging that "[t]he use of a first-in/first-out ("FIFO") method to offset class period stock sales against pre-class period stock holdings to calculate a potential lead plaintiff's 'financial interest in the relief sought by the class' is

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might do a better job of protecting the interests of the class than the presumptive lead plaintiff; instead, the question is whether anyone can prove that the presumptive lead plaintiff will not do a fair and adequate job. We do not suggest that this is a low standard, but merely stress that the inquiry *is not* a relative one." *In re Cendant Corp. Litig.*, 264 F.3d 201, 268 (3d Cir. 2001) (emphasis in original, internal quotation marks omitted). While the State Group has rebutted the presumption as to the Florida Group, Milberg cannot rebut the presumption as to the State Group.

appropriate."). Counsel stands by its damages calculations and will be glad to discuss those calculations in more detail if the Court so desires.

The State Group calculated its losses in accordance with Generally Accepted Accounting Principles ("GAAP"). Under the accounting method used by the State Group, the first shares purchased are accounted as the first shares sold. *Proceeds from the sale of shares purchased and sold during the class period, if any, are netted from the State Group's damage claims.*[5] *See, e.g.,* Declaration and Certification of Stephen H. Huber on Behalf of The State Teachers Retirement System of Ohio, ¶ 5, and Declaration and Certification of Laurie F. Hacking on Behalf of The Public Employees Retirement System of Ohio, ¶ 5 (attached to the Affidavit of Tom Cunningham dated December 21, 2001, as "Exhibit B").

Moreover, there is no conflict because members of the State Group purchased and sold shares during the class period. It is well settled that "in and out" purchasers satisfy Rule 23. *Welling v.*

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[5] This methodology, known as "FIFO," is recognized not only by the IRS, but also by *every* court of appeals, as the appropriate methodology for determining gains or losses from stock purchases. *See, e.g.,* 26 C.F.R. 1.102-1(c); *Helvering v. Campbell*, 313 U.S. 15, 20-21 (1941); *Wood v. Commissioner of Internal Revenue*, 197 F.2d 859, 863 (5th Cir. 1952); *Hall v. Commissioner of Revenue*, 1989 U.S. Tax Ct. LEXIS 66, *2-3, *11, *23-24 (May 15, 1989). The State Group believes that all of the other institutions in this case have calculated their losses in the same manner. Indeed, Milberg has been a staunch supporter of the use of FIFO for calculating losses, and authored an article on this very subject. Fred B. Burnside, *Fee-Fi-Fo-Fum: Why The Rejection Of FIFO Is . . . Not Smart*, Class Action Litigation (BNA) Vol. 2, No. 21 at 786 (Nov. 9, 2001) (attached as Exhibit A to the Reply of the State Retirement Systems Group in Support of Its Motion for Appointment as Lead Plaintiff and its Selection of Lead Counsel). As Milberg stated in the article: "The FIFO method of calculating losses has been the controlling method used by courts in securities class actions both before and after the PSLRA. . . . The rejection of FIFO methodology would result in the virtual elimination of institutional investor participation in securities class actions because those investors tend to have large pre-class period holdings that will be held against them." *Id.* at 788-89.

Alexy, 155 F.R.D. 654, 661 (N.D. Cal. 1994) (in/out traders can recover damages and serve as class representatives); *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 411 (D. Minn. 1998) (including in/out losses in the calculation of "financial interests" for purposes of selecting lead plaintiff). In fact, prior to their expedient change in position here, Milberg has consistently taken the position that in/out traders are proper class representatives. *See, e.g.*, Burnside, *Fee-Fi-Fo-Fum: Why The Rejection Of FIFO Is . . . Not Smart*, Class Action Litigation (BNA) Vol. 2, No. 21 at 789.

CONCLUSION

In sum, (1) the State Group qualifies as a group under the PSLRA; (2) the State Group has the largest losses of any lead plaintiff movant other than the Florida Group; and (3) the Florida Group cannot serve as lead plaintiff. Thus, the State Group is the presumptive lead plaintiff under the PSLRA. No other applicant has rebutted this statutory presumption, so the State Group should be appointed lead plaintiff. For all the reasons set forth herein and in previously filed briefs, the State Retirement Systems Group respectfully submits that it should be appointed lead plaintiff and that its selection of counsel should be approved.

Dated: February 1, 2002

Respectfully submitted,

CUNNINGHAM, DARLOW, ZOOK & CHAPOTON, LLP

By: _____ sig by RJZ

Tom A. Cunningham
1700 Chase Tower
600 Travis
Houston, Texas 77002
(713) 255-5500

Proposed Liaison Counsel

CHITWOOD & HARLEY
Martin D. Chitwood
Special Assistant Attorney General
2900 Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 873-3900

Proposed Lead Counsel

OF COUNSEL:

THURBERT E. BAKER
Attorney General of Georgia

DANIEL M. FORMBY
Deputy Attorney General (GA)

JOHN B. BALLARD, JR.
Senior Assistant Attorney General (GA)

EMILY P. HITCHCOCK
Assistant Attorney General (GA)

BETTY D. MONTGOMERY
Attorney General of Ohio

ANDREW BOWERS
Director of Special Counsel (OH)

CALFEE, HALTER & GRISWOLD LLP
Robert N. Rapp
Mark I. Wallach
Albert J. Lucas
1650 Fifth Third Center
21 E. State Street
Columbus, OH 43215
(614) 621-1500

CHRISTINE O. GREGOIRE
Attorney General of Washington

DAVID E. WALSH
Deputy Attorney General (WA)

JEFFREY O.C. LANE
Senior Assistant Attorney General (WA)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been served on all known counsel of record via facsimile on this 1st day of February, 2002.

Richard J. Zook

DECLARATION OF SUPPORT FROM THE ATTORNEYS GENERAL OF THE STATES OF ILLINOIS, KENTUCKY, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON AND TENNESSEE FOR THE APPOINTMENT OF THE TEACHERS AND EMPLOYEES' RETIREMENT SYSTEMS OF GEORGIA, THE TEACHERS AND EMPLOYEES' RETIREMENT SYSTEMS OF OHIO, AND THE WASHINGTON STATE INVESTMENT BOARD AS LEAD PLAINTIFF

February 1, 2002

We, the following listed State Attorneys General, as the chief legal officers and primary consumer protection officials of our respective states, respectfully submit this Statement of Support for the Appointment of the Teachers and Employees' Retirement Systems of Georgia and Ohio, and the Washington State Investment Board (collectively, the "State Retirement Systems Group") as Lead Plaintiff and Its Counsel as Lead Counsel.

We are gravely concerned about the collapse of the Enron Corporation and the alleged associated violations of federal securities laws. We have a substantial interest in this class action because these events have had an enormous effect on millions of individuals and institutions throughout this country. Whoever is appointed as the "Lead Plaintiff" of this case will have tremendous obligations to the putative class members.

Georgia, Ohio and Washington, the members of the State Retirement Systems Group, have a long-standing prior relationship protecting and enforcing the rights of others. Each of the State Attorneys General is a member of the National Association of Attorneys General ("NAAG"). For many years, the State Attorneys General, through NAAG, have been promoting cooperation and coordination on interstate legal matters to foster a responsive and efficient system of addressing issues of public common concern and protecting the public from the practices alleged to have occurred in this case. The State Attorneys General, including the Attorneys General of Georgia, Ohio and Washington, have worked together on a number of complex legal matters in the past, including jointly-prosecuted cases involving the tobacco companies, Bridgestone/Firestone, Medaphis, Toys "R" Us, Nine West and Vitamin Price Fixing antitrust claims, and many others. In addition, Georgia, Ohio and Washington have worked together on jointly prosecuted cases involving bank privacy issues, and other cases against drug manufacturers, CVS and Walgreens.

Respectfully, we believe that this class action would be most effectively prosecuted if the State Retirement Systems Group were appointed Lead Plaintiff and its counsel appointed Lead Counsel.

Respectfully submitted:

Jim Ryan
THE HONORABLE JIM RYAN
Attorney General for the State of Illinois

Frankie Sue Del Papa
THE HONORABLE FRANKIE SUE DEL PAPA
Attorney General for the State of Nevada

Patricia Madrid
THE HONORABLE PATRICIA A. MADRID
Attorney General for the State of New Mexico

Paul G. Summers
THE HONORABLE PAUL G. SUMMERS
Attorney General for the State of Tennessee

Albert B. Chandler, III
THE HONORABLE A.B. CHANDLER III
Attorney General for the Commonwealth of Kentucky

Drew Edmondson
THE HONORABLE W. A. DREW EDMONDSON
Attorney General for the State of Oklahoma

Roy Cooper
THE HONORABLE ROY COOPER
Attorney General for the State of North Carolina

Hardy Myers
THE HONORABLE HARDY MYERS
Attorney General for the State of Oregon

Frankie Sue Del Papa

The Honorable Frankie Sue Del Papa
Attorney General for the State of Nevada

The Honorable Patricia A. Madrid
Attorney General for the State of New Mexico

The Honorable Paul G. Summers
Attorney General for the State of Tennessee

The Honorable A.B. Chandler III
Attorney General for the Commonwealth of Kentucky

The Honorable Frankie Sue Del Papa
Attorney General for the State of Nevada

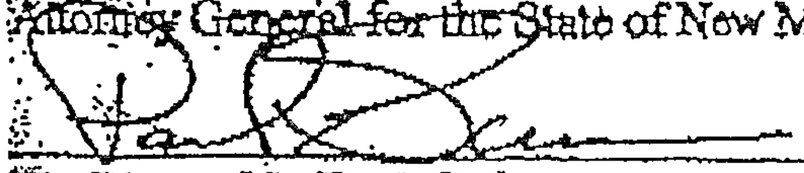
Patricia A. Madrid /SHB
The Honorable Patricia A. Madrid
Attorney General for the State of New Mexico

The Honorable Paul G. Summers
Attorney General for the State of Tennessee

The Honorable A.B. Chandler III
Attorney General for the Commonwealth of Kentucky

The Honorable Frankie Sue Del Papa
Attorney General for the State of Nevada

The Honorable Patricia A. Madrid
Attorney General for the State of New Mexico



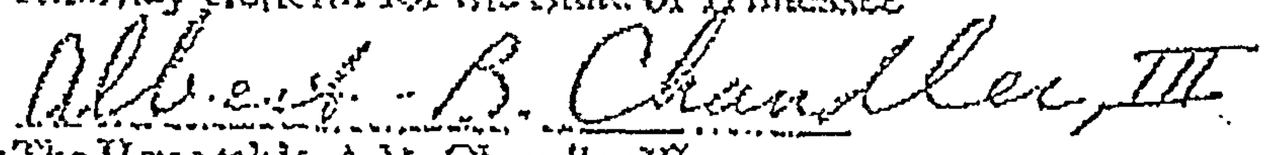
The Honorable Paul G. Summers
Attorney General for the State of Tennessee

The Honorable A.B. Chandler III
Attorney General for the Commonwealth of Kentucky

The Honorable Frankie Sue Del Papa
Attorney General for the State of Nevada

The Honorable Patricia A. Madrid
Attorney General for the State of New Mexico

The Honorable Paul G. Summers
Attorney General for the State of Tennessee



The Honorable A.B. Chandler III
Attorney General for the Commonwealth of Kentucky

The Honorable Jim Ryan
Attorney General for the State of Illinois

THE TCW GROUP, INC.
865 SOUTH FIGUEROA STREET
LOS ANGELES, CALIFORNIA 90017
(213) 244-0000

MICHAEL E. CAHILL
MANAGING DIRECTOR
GENERAL COUNSEL

January 31, 2002

The Honorable Melinda Harmon
United States District Court
for the Southern District of Texas
Federal Courthouse
515 Rusk
Houston, TX 77002

Re: Civil Action No. H-01-3624; *Newby v. Enron Corporation, et al.* (consolidated), In the United States District Court for the Southern District of Texas, Houston Division

Statement of Support for the Appointment of the Teachers and Employees' Retirement Systems of Georgia and Ohio, and the Washington State Investment Board as Lead Plaintiff and Its Counsel as Lead Counsel

Dear Judge Harmon:

The TCW Group of Companies ("TCW") has been providing investment management services to institutions and individuals for more than thirty years and currently has approximately $85 billion of assets under management. TCW invested millions of dollars in both debt and equity of Enron and, like many other institutional investors, has suffered losses with its collapse.

TCW is generally familiar with the class action before Your Honor and the position of the State Attorneys General who are part of the applicant for lead plaintiff known as the State Retirement Systems Group ("the State Group"), and submits this statement in support of their selection as lead plaintiff and for the appointment of their designated attorneys as lead counsel.

As a shareholder in Enron and other corporations, TCW is concerned not only with the significant impact that the collapse of Enron has had on individual investments, but also with the repercussions that Enron's failure has had on the securities market generally. TCW has noted the allegations that the Company's audited financial statements did not comply with generally accepted accounting principles. TCW believes that the resolution of this case not only will affect the shareholders of Enron, but will most likely have a significant impact on issues of corporate

governance generally and will define important principles of the relationship between auditor and issuer which ensure the integrity of the entire securities market.

TCW believes that the lead plaintiff in this case will owe an obligation to both the members of the class represented and the nation as a whole. To this end, TCW believes that the State Group, comprised of the Attorneys General of Georgia, Ohio and Washington, is a most appropriate and desirable candidate for lead plaintiff. TCW has confidence in the Attorneys General to put the interest of the class, and the investing public, above any private concerns, and believes that their offices possess the requisite knowledge and skill necessary to successfully prosecute this case.

In particular, TCW commends the decision of the Attorneys General in selecting Grant & Eisenhofer as their proposed lead counsel. TCW is familiar with the law firm of Grant & Eisenhofer, PA, who represented TCW in a class action in Delaware and obtained the largest settlement in Delaware Chancery Court history. Based on our extensive experience with Grant & Eisenhofer, TCW is confident that the litigation will not be controlled by lawyers with personal interests in the case, but will be controlled by the clients – the Attorneys General – whose commitment to the public is paramount.

For these reasons, TCW respectfully submits that the interests of the class and the interests of the public would be best served if the State Retirement Systems Group were appointed lead plaintiff and Grant & Eisenhofer appointed lead counsel.

Respectfully yours,

Michael Cahill
Managing Director and General Counsel